SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 357

THE MARYLAND AND VIRGINIA ELDERSHIP OF THE CHURCHES OF GOD, *et al.*,
Appellants,

v.

THE CHURCH OF GOD AT SHARPSBURG, INC., *et al.*,
Appellees.

BRIEF, *AMICUS CURIAE,* IN SUPPORT OF JURISDICTION OF THE GENERAL ELDERSHIP OF THE CHURCHES OF GOD IN NORTH AMERICA

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This brief *amicus curiae* is submitted with the consent of counsel for both parties to this appeal.

Interest of the *Amicus*

The General Eldership of the Churches of God in North America is the parent body of the appellant Maryland and Virginia Eldership, which in turn is the parent body of appellees The Church of God at Sharpsburg, Inc. and the Indian Springs Church of God, and as such has a vital in-

terest and concern in the determination of this litigation. The appeal in this case brings to the Court the question of the ecclesiastical and theological integrity of the Churches of God in North America.

Statement of the Case

The Churches of God in North America is a small Protestant denomination founded in Pennsylvania in 1825 under the leadership of John Winebrenner, a German Reformed minister. Today it comprises about 300 individual churches with a total membership of about 30,000, mostly in the middle-Atlantic and midwestern states. Its national headquarters are in Harrisburg, Pennsylvania, where it also operates the Central Publishing House. It also maintains the Winebrenner Seminary and Findlay College, both at Findlay, Ohio, and mission fields in Haiti, India and East Pakistan.

The ecclesiastical structure of the denomination is set forth in the stipulated record in this case, which includes the governing constitutions of the national and state judicatories of the denomination. The structure is hierarchical, with the General Eldership at the apex. The General Eldership, consisting of representatives of the annual or state Elderships, meets triennially and has plenary jurisdiction over the entire denomination, the annual Elderships, the individual churches and all members of the denomination. Between triennial sessions these plenary powers of the General Eldership are delegated by the constitution to the Administrative Council of the General Eldership and its Executive Committee. The constitution (Article

XXII) imposes upon the General Eldership (or its Executive Committee) the duty and responsibility to guard against schisms and provides that in the event of any irregularity in teaching, practice or polity the General Eldership or its Executive Committee shall express its judgment thereon and require the annual Eldership involved to carry the judgment into effect.[1]

Between the General Eldership and the individual churches stand the annual Elderships, of which the corporate appellant herein is one. It is the annual Eldership, composed of representatives of the individual churches, which exercises immediate control and jurisdiction over the individual churches. Local churches are assessed and pay regular amounts for the support of the annual (and General) Elderships, and the ministers who occupy the pulpits of the local churches are appointed (and subject to removal by) the appropriate committee of the annual Eldership.

In the history of the denomination, spanning a period of almost a century and a half, there have been prior to the present controversy only two attempted secessions by local

1. This is substantially the same as the corresponding provision in the constitution of the Presbyterian Church in the United States, to which the Court in *Watson* v. *Jones*, 80 U.S. (13 Wallace) 679 (1871), ruled it was required to give legal effect. The specific language was: "To the General Assembly also belongs the power of deciding in all controversies respecting doctrine and discipline; of reproving, warning, or hearing testimony against error in doctrine or immorality in practice, in any Church, Presbytery, or Synod; * * * of superintending the concerns of the whole church; * * * of suppressing schismatical contentions and disputations; and, in general, of recommending and attempting reformation of manners, and the promotion of charity, truth and holiness through all the churches under its care." *Ibid.* at p. 682.

churches, and in both instances the disputes reached the civil courts. The first, *Winebrenner* v. *Colder*, 43 Pa. 244 (1862), arose over the right to control and occupy the Church of God in Harrisburg. The congregation split between a majority which desired to employ as a pastor James Colder, John Winebrenner's son-in-law, even though he had been expelled from the East Pennsylvania Eldership and was no longer recognized by it as the pastor of the Harrisburg church, and a minority which desired to receive the person duly appointed by the annual Eldership as pastor of the church. In a decision which anticipated *Watson* v. *Jones* by a decade, the Pennsylvania Supreme Court said (at p. 256):

> The trustees, who are the elders, hold the property for the use of the congregation, and that consists of all those who are in full communion with the church, and who adhere or are willing to submit to the regular order of the church: and adherence to the general denomination, while it continues sound and orderly, is one of the essential elements of that order. According to the fundamental, legal, and equitable principles of such associations, that majority which makes use of its corporate forms for the purpose of instituting an organized resistance to the legitimate authority of their ecclesiastical superiors; that expels the members of the minority for refusing to contribute to the support of their disorderly organization; and that institutes as its pastor a regularly expelled minister of their denomination: such a majority is not the true congregation * * *

The second instance occurred in 1961 when the majority of a local congregation at New Haven Center in Michigan

purported to declare its independence of the Michigan Eldership and the General Eldership because the latter had contributed some funds (which presumably included moneys that it had received indirectly from the local congregation via the Michigan Eldership) to the National Council of Churches of Christ in the U.S.A. and had cooperated in some respects with that organization. In an unreported opinion issued by the Michigan Circuit Court of Gratiot County, *Michigan Eldership* v. *Knight*, it was again held that under the constitution and governmental structure of the Churches of God the majority of a local congregation had no legal right to withdraw the church from the denomination, refuse to allow access to the pulpit to a pastor appointed by the annual Eldership or expel from the congregation those members who voted against the resolution of disaffiliation.

The record in the present case does not reveal the causes that impelled the majorities in the Sharpsburg and the Indian Springs churches to assert their independence but it does reveal that in each case prior to the schism the local church had been in full and loyal communion with the Eldership, accepting the pastors appointed by it, contributing to its upkeep and in all other ways submitting to its authority. The record reveals too that in each case the resolution of independence was followed by retaining as pastors persons whose ordination had been revoked by the Maryland Eldership and refusing access to the pulpit to pastors duly appointed by the Eldership. The dispute reached the Executive Committee of the General Eldership

for determination pursuant to Article XII, Section 4[2] and Article XXII, Section 2,[3] of the denomination's constitution.

On July 29, 1966, the Executive Committee rendered its judgment that all persons who voted to withdraw from the Maryland and Virginia Eldership had thereby "abandoned and forfeited all rights, privileges, properties and offices in the local church and in the Churches of God * * *. In each local church the members who continue to adhere and submit to the doctrines and polity of the denomination, constitute the true congregation. The Executive Committee, as the duly constituted Supreme Court of the Churches of God, so determines, reaffirming that the presbyterial polity of the Churches of God recognizes no right of secession on the part of the congregation affiliated with the denomination * * *."

The Maryland courts refused to give legal effect to this judgment of the Executive Committee. The reasoning of the Court of Appeals was that the case was governed by the Maryland General Religious Corporation Law under which both the Sharpsburg and Indian Springs churches

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2. "The Executive Committee shall be vested with judicial power, and its jurisdiction shall extend to all cases under the Constitution not otherwise provided for * * *"

3. "That the method [of "Guarding Against Schisms"] shall be, upon information of irregularities in teaching, practice, or polity, furnished by an annual Eldership or its Standing Committee, or, in the absence of such official information, upon due information obtained otherwise, for the General Eldership, or the Executive Committee, to express its judgment on matters brought before it, and require the annual Eldership or Elderships, involved to carry said judgment into effect."

were incorporated and that under that law [4] the majorities in the two congregations were the owners of the respective properties and could in that capacity withdraw from the denomination, whereafter the congregations were completely independent of the denomination and in no way subject to the Executive Committee or its judgments. The Court of Appeals said:

> The action taken by Sharpsburg and Indian Springs was by a majority of the respective congregations exercising their rights and powers over the church property in accordance with the General Religious Corporation Law. (Jurisdictional Statement, p. A-26.)

The Court of Appeals distinguished *Winebrenner* v. *Colder* and *Michigan Eldership* v. *Knight* on the ground that those cases did not involve statutory provisions sim-

4. Particularly Section 257, which provides: "In every church, religious society or congregation, of whatever sect, order or denomination, or which shall at any time hereafter be known and acknowledged in the State, and protected by the free and full exercise of its religion by the Constitution and the laws thereof, there shall be sufficient power and authority in all persons above twenty-one years of age belonging to any such church, society or congregation, to elect, at their discretion, certain sober and discreet persons, not less than four, nor more than twenty-five, which persons so elected, upon being registered, as hereinafter directed, shall be constituted a body politic or corporate to act as trustees in the name and behalf of the particular church, society or congregation for which they are respectively chosen, and manage the estate, property and inheritance of the same." The literal language of the section would seem hardly adequate to support the Court of Appeals' conclusion, speaking as it does only of the power to "manage" the property without any indication of a power to withdraw it from the denomination. This Court, however, is bound by the Court of Appeals' interpretation, not merely as to the power of withdrawal but also that a consequence of the statutorily authorized withdrawal of the property is a termination of all relations between the denomination and the withdrawing congregation so that neither its doctrines nor its discipline need or should be given any legal effect by a civil court. It is our contention that the statute so interpreted contravenes directly the holding of *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952).

ilar to those of Section 257 of the Maryland General Religious Corporation Law and that accordingly in those cases the dissident congregations were not exercising statutorily protected rights.[5]

Argument

The pervasive assumption that underlay the disestablishment of churches during the last quarter of the 18th and first quarter of the 19th centuries was that it was better for all if the state would not involve itself in religious affairs.[6] Evidence of America's commitment to this ethic is found in the fact that Jefferson's epitomization of it—"wall of separation between church and state"—quickly became a national maxim. When a schismatic controversy breaks out within a church, intervention by the state often cannot be avoided, if for no other reason than to preserve the peace by preventing resolution of the controversy through physical combat,[7] or to protect the state's sub-

5. The Court of Appeals stated two additional grounds for distinction in respect to *Winebrenner*, but they seem hardly to be significant. In that case, the Court of Appeals said, "there was no question of the property of the local congregation involved." (Jurisdictional Statement, p. A-211.) But denial of access to the pulpit to a pastor appointed by the Eldership would certainly involve the question of control of the property. As for the second ground, that "the local congregation had not voted to leave the parent body" (*ibid.*), that would hardly seem to be relevant in view of the Pennsylvania court's decision that those who defied the authority of the Eldership thereby effectively withdrew from the denomination.

6. "As to religion, I hold it to be the indispensable duty of government to protect all conscientious professors thereof, and I know of no other business which government hath to do therewith." T. Paine, *Common Sense* 49 (Dolphin Books 1960).

7. It was such a disturbance between the competing factions that propelled the Walnut Street Presbyterian Church controversy into the courts. *Watson* v. *Jones, supra,* 80 U.S. at 685.

stantial interest in ascertaining the responsible ownership of property. Nevertheless, disestablishment requires that such intervention in theological affairs be kept to the minimum necessary to protect the state's legitimate interests. See *United States* v. *Ballard,* 322 U.S. 78, 86-88 (1944).

In exercising its unavoidable intervention in church schisms, the court may employ one of several criteria in determining which faction shall receive the protection that the state accords to ownership of property. It may follow the English practice and decide which of the contending factions most closely approximates in its practices and doctrines the orthodoxy of the faith to which both factions declare allegiance. *Attorney General ex rel. Mander* v. *Pearson,* 3 Mer. 353, 36 Eng. Rep. 135 (1817); *Craigdallie* v. *Aikman,* 2 Bligh 529, 4 Eng. Rep. 435 (1820). This approach was rejected in *Watson* v. *Jones,* first, on the practical ground that the civil tribunal does not have the competence to decide theological controversies or at least has less competence than the ecclesiastical tribunals of the particular faith involved, and secondly, and more importantly, that governmental assumption of power to adjudicate between orthodoxy and heresy was inconsistent with the spirit of disestablishment. 80 U. S. at 728-729.

A second approach would be to follow the legal title. Those who have the legal title to a particular church would have the legal right to decide what liturgy shall be practiced within that church, what sermons shall be preached there and which pastors shall be allowed to conduct the liturgy or preach the sermons. This approach too was rejected in *Watson* v. *Jones,* since its adoption would subordinate the

end to the means. Vesting legal title to church property in certain persons as trustees is simply a convenient device for the management of the church's secular affairs so that it will be able to pursue its religious purposes. The equitable principles which severely limit the powers of a fiduciary over property, title to which he holds in trust, are particularly applicable where the purpose of the trust is the preservation and advancement of a religious faith.

A third approach came about as a result of the confrontation of Jeffersonian separationism with Jeffersonian decentralized majoritarianism. On the one hand the state legislatures and courts were willing to insure the independence of churches from state intervention in their affairs. On the other, they deemed the principles of political democracy and the fear of central authority equally relevant to church affairs. Accordingly, the same statutes which granted the right of self-government to churches provided simultaneously that such government would be controlled by the majority in each individual church. Howe, *The Juridical Status of Churches,* Proceedings of the Institute of Church and State, 1958, pp. 10-11.

The Court in *Watson* v. *Jones* was not faced with the necessity of choosing between ecclesiastic self-government and local majoritarianism because the majority of the congregants (though not of the trustees) of the Walnut Street church were loyal to the General Assembly of the Presbyterian Church. That the Court's decision in no way stressed this fact but decided the case on entirely different grounds indicates quite clearly that the Court's decision would not have been different had the majority Walnut Street congregation sided with the pro-slavery trustees.

The effort to impose majoritarian decentralization upon the churches created great difficulties for those faiths governed by a hierarchical polity, and gave rise to considerable intra-church controversy and litigation. The major hierarchical denominations were able to preserve their ecclesiastical polity either by ultimate state judicial acceptance of the rule of *Watson* v. *Jones* or by obtaining enactment of special statutes fashioned to insure central authority over rebellious local majorities.[8]

Maryland followed the latter course. As the Court of Appeals pointed out, the "present General Religious Corporation Law is based upon and largely follows the original legislation on this subject, i.e., the Act of 1802, chapter 111." (Jurisdictional Statement, p. A-6.) The purpose (and effect, as construed and applied by the Court of Appeals in the present case) was to insure control of each church by a majority of the lay congregation. The major hierarchical denominations, however, were able to preserve their ecclesiastical structure by obtaining appropriate legislative enactments from time to time.

Thus, in respect to the Roman Catholic Church, Article 23, Section 271, Annotated Code of Maryland (1966) provides that the religious corporation shall consist of "the ordinary [bishop] and the vicar-general of the archdiocese, the pastor of the said congregation for the time being, according to the discipline and government of the Roman Catholic Church, and such other persons (if any) as may

8. For the history of the struggle within Roman Catholicism, see Dignan, *History of the Legal Incorporation of Catholic Church Property in the United States* (1935). For a summary of the oscillations in one state (Pennsylvania), see Pfeffer, *Church, State, and Freedom*, at 293-295 (rev. ed. 1967).

be appointed by the ordinary to act as additional corporators * * *."

For the Protestant Episcopal Church, Section 283 assures diocesan control by providing that "In his use of the property of the parish or separate congregation as above provided, the rector shall conform to the requirements of the canons of the diocese in which his parish or cure shall be."

For the Methodist Church, Section 313(e) provides that "All real, personal and mixed property owned by any Methodist Church, * * * shall be held in trust by the trustees of such church for the uses of the Methodist Church and shall be subject to the discipline, usage, and ministerial appointments of the Methodist Church as from time to time authorized and declared by the general conference of the Methodist Church."

Presbyterianism is provided for by Section 314 which declares that "Presbyterian Churches may be incorporated only in conformity with the provisions of the Presbyterian Church in the United States of America and its successors, from time to time in effect," and that "the charters of all such Presbyterian Churches heretofore incorporated shall be deemed to be hereby amended to conform to the provisions of the constitution of the Presbyterian Church in the United States of America, and its successors from time to time in effect."

No special statutes were necessary for the Baptist, Congregationalist and Jewish denominations because, as the Court of Appeals characterized it, by "coincidence * * *

the ownership and control of property by the religious corporation formed under the General Religious Corporations Law is, prima facie, consistent with the government and polity of the Baptist and Congregational Churches and of the Jewish Synagogues." (Jurisdictional Statement, p. A-24.)

The effect of all this is that the Churches of God and all other small denominations (of which there must be scores in Maryland)[9] are all cast into a common legislative melting pot and come out in a congregationalist mold. So long as *Watson* v. *Jones* remained a rule of Federal judicial policy, this legislative action by Maryland raised no questions under the First Amendment (although it did raise serious questions under the equal protection clause of the Fourteenth). *Kedroff* and *Kreshik* v. *St. Nicholas Cathedral*, 363 U. S. 190 (1960), however, elevated the rule of *Watson* v. *Jones* to the status of constitutional mandate, based not only on church-state separation but upon religious freedom as well, and this compelled the Court of Appeals to meet the constitutional challenge.

The Court of Appeals sought to do so by asserting that the statute here in issue "was not intended in any way to interfere with or 'establish' the doctrines or disciplines of any religious body. What was intended was to provide for the formation of religious corporations for local congregations which would hold, control and have power to dispose of *the property* of the religious corporations. The Act of 1802 and its successor acts in no way sought to establish any ecclesiastical polity." (Jurisdictional Statement, p. A-23. Emphasis in original.)

9. The 1936 Census of Religious Bodies lists more than 250 separate denominations in the United States.

Whatever may have been the intent of the Maryland legislature in 1802 (and, as we have indicated, the Court of Appeals appears to be in error as to this), the present statute as interpreted and applied by the Court of Appeals in the present case goes far beyond merely regulating secular aspects of the ownership of real property. It does in fact establish a congregationalist polity for all churches (other than the major denominations protected by special statutes), although it does so in two stages. The first stage is to confer control of the real property upon the majority of the local congregation; the second is to attach, as an incident of that control, first, the power of complete secession from the hierarchical denomination of which it is a part, even though (as in the present case) the constitution of the denomination as interpreted by its highest judicatory does not recognize any right of secession, and secondly, such powers consequent on secession as rejecting the pastor duly designated by the higher body, discontinuing payment of required contributions, ousting from the congregation persons loyal to the denominational authorities, and refusing to honor and obey a judgment duly rendered by the denomination's highest judicatory.

This, under *Watson* and *Kedroff*, may not be done. In both cases, the Court specifically refused to allow the locus of legal ownership of the realty to determine the locus of power to appoint pastors or define membership. In both cases, the Court held that beneficial ownership of the realty (as distinct from legal title) is in the same class as the other aspects of ecclesiastical existence and like them must be determined by the denomination's highest judicatory, and not by civil government acting either legislatively (as in

Kedroff and the present case) or judicially (as in *Watson* and *Kreshik*).

The Court of Appeals stated (at p. A-13 of Jurisdictional Statement) that a hierarchical denomination such as the Churches of God may avoid what is in effect a statutory establishment of congregationalist polity in any one of three ways:

1. It may require reverter clauses in the deeds to the property of local churches.
2. It may provide in its constitution or by some other authoritative source for the reverting of the local church property to the hierarchical body upon the withdrawal by a local congregation with an implied consent by the local church to this provision.
3. It may obtain from the General Assembly an act providing for such a result.

There are, we submit, unanswerable constitutional objections to compelling the Churches of God or similar hierarchical denominations from electing any of these alternatives. In respect to the first, it may be noted that the deeds to the properties involved in this suit (other than the parsonage at Indian Springs) do contain reverter clauses to the Maryland and Virginia Eldership, in the case of the church at Sharpsburg if it "ceases to function as a church organization," and in the case of the church at Indian Springs if it should "become extinct or cease to be." The Court of Appeals held that the clauses had not become effective because in neither case did the church "cease to function as a church organization" or "become extinct or cease to be." We agree with this conclusion, but for a fundamen-

tally different reason. According to the constitution and doctrines of the Churches of God (as well as probably most other hierarchical denominations) a local church does not "cease to function" or "cease to be" so long as there are any members faithful to the denomination, its doctrines and discipline, who remain in it. They (represented as a class by the individual appellants herein), though a minority, continue to be "the church at Sharpsburg" or "the church at Indian Springs." So it had been ruled in the two previous attempted secessions from the Churches of God and so too was it ruled in the present case by the highest denominational judicatory.[10]

To compel the Churches of God to require local churches to insert in their deeds a provision that if a majority of the congregation rejects the authority of the denomination the real property shall revert to the Eldership is, we submit, compelling it to change fundamentally its constitution, doctrine and government, and is as much an interference with the denomination's religious liberty as was the attempted legislative and judicial action in *Kedroff* and *Kreshik*.

The same constitutional objection is applicable to the second and third alternatives posed by the Court of Appeals, but additional objections apply to the latter. In the first place, nothing in the record or in such political history of Maryland as this Court may judicially note warrants an assumption that if the denomination had applied to the legislature for a special protective statute, such application

10. The Executive Committee of the General Eldership rendered judgment, stating in part: "In each local church the members who continue to adhere and submit to the doctrines and polity of the denomination constitute the true congregation."

would have been granted.[11] Is it not significant that the present laws of Maryland provide special protection only for the major—one might almost call them "established"—churches, i.e., the Roman Catholic, Methodist, Presbyterian and Episcopalian Churches?

In the second place, the constitutionality of Maryland law must be judged as it now is, not as it may be at some future time. Under present law, it is clear that a directly contrary result would have been reached in these cases if the church at Sharpsburg were Roman Catholic and the one at Indian Springs were Presbyterian. This is so not because these denominations are less hierarchical than the Churches of God—indeed, the Presbyterian is probably less so—but only because they are the beneficiaries of special statutes while the Churches of God is not.[12] This clearly amounts to preferential treatment of these faiths over that of the Churches of God. This constitutes a violation of the Establishment Clause of the First Amendment, for whatever else that clause may forbid it certainly forbids preferential treatment by government of some churches over others. *Everson* v. *Board of Education,* 330 U. S. 1, 15

11. It should be noted that the legislative policy of the State of Maryland is opposed to applications by religious groups for special legislation. Article 23, Section 270, of the Annotated Code of Maryland, provides that "In order to carry out the purpose of §§33 and 48 of Article III of the Constitution of Maryland and in order to prevent the enactment of special laws, amending the charters of religious corporations heretofore incorporated by special act, no bill shall hereafter be introduced at the General Assembly of Maryland for the purpose of amending the charter of any such religious corporation * * *."

12. As summarized by the trial court, "The G.E. [General Eldership] constitution makes it clear that the local churches are subject to the Annual Elderships and the Annual Elderships subject to the G.E. or its Executive Committee in all church matters." (Jurisdictional Statement, p. B-10.)

(1947); *McCollum* v. *Board of Education,* 333 U. S. 203, 210 (1948). It also constitutes a violation of the equal protection clause of the Fourteenth Amendment. *Fowler* v. *Rhode Island,* 345 U. S. 67, 70 (1953) (concurring opinion of Mr. Justice Frankfurter). It would make a mockery of both constitutional guarantees if a religious group discriminated against could be barred from obtaining judicial relief because of the possibility that it may obtain legislative relief if it applies for it to the legislature.

Above all, however, all three suggested alternatives miss the essential constitutional issue in this case. It is not whether the Churches of God can by one means or another escape from the congregationalist polity imposed by the State's General Religious Corporation Law upon small hierarchical denominations; it is whether the State has constitutional power at all to impose such a polity upon them. We submit that under *Watson, Kedroff* and *Kreshik,* it does not, any more than the public school authorities in *McCollum* v. *Board of Education, supra, Engel* v. *Vitale,* 370 U. S. 421 (1962) and *Abington School District* v. *Schempp,* 374 U. S. 203 (1963) could impose religious teachings or prayers even though in each case children of small, minority faiths could obtain exemption from participation by applying to the authorities for it.

Conclusion

In the eighty years between *Watson* and *Kedroff* the rule of *Watson* worked well, so well that most states faced with the question adopted it though they were not constitutionally required to do so. *Judicial Intervention in*

Church Property Disputes—Some Constitutional Considerations, 74 Yale L. J. 1112, 1122 (1965). In the sixteen years since *Kedroff* was decided, the rule has worked well as a constitutional mandate. An effort to weaken it from one direction will be before this Court in the case of *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, October Term 1967, No. 1380, certiorari granted, 88 S. Ct. 2060. The present case presents an effort to weaken if not frustrate it from another direction. The *Watson-Kedroff-Kreshik* rule protects the integrity of churches and freedom of religion. It should be preserved in all its vigor and effectiveness. Accordingly, probable jurisdiction should be noted in this case.

Respectfully submitted,

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